

Service Date: April 30, 1996

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER of William H. Hoye, |) | TRANSPORTATION |
| DIVISION | | |
| dba Blacktail Disposal, Lakeside, Montana, |) | |
| Application for a Montana Intrastate |) | DOCKET NO. T-95.73.PCN |
| Certificate of Public Convenience and Necessity. |) | ORDER NO. 6397a |

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Robert N. Crosswhite, Esq., Hartelius, Howard, Crosswhite & Baker, L.L.P., P.O. Drawer
220, Lakeside, Montana 59922

FOR THE PROTESTANTS:

G. Steven Brown, Esq., Keegan & Brown, 1313 Eleventh Avenue, Helena, Montana,
representing Timothy W. Balazic, d/b/a/ Northwest Disposal Service, and Marc W. Johnson,
d/b/a Flathead Disposal, Inc.

Shelly Brander, Esq., 4000 2nd W. Centre, 22nd Ave. W, P.O. Box 728, Kalispell, Montana
59903, representing Evergreen Disposal, Inc.

FOR THE COMMISSION:

Denise Peterson, Staff Attorney, and Wayne Budt, Administrator, Transportation Division,
1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

BEFORE:

BOB ROWE, Commissioner and Hearing Examiner

Pursuant to 2-4-621, MCA, a proposed order authorizing a grant of the authority requested
was issued in this matter on April 3, 1996. No exceptions, briefs or requests for oral argument have
been received. Therefore, the Commission adopts the proposed order as its final order in this matter.

BACKGROUND

1. William H. Hoyer, dba Blacktail Disposal, Lakeside, Montana (Applicant or Hoyer) filed an application with the Montana Public Service Commission (Commission) on October 12, 1995 for a Class D certificate of public convenience and necessity limited to transportation of residential garbage within the cities of Lakeside, Somers, Rollins and within a five mile radius around each city, between all points and places within Lake and Flathead counties, delivering the garbage to the central landfill.

2. Hoyer filed a clarification on October 26, 1996, stating that he was applying to serve the towns of Lakeside, Somers and Rollins and a five-mile radius of each town. The application was duly noticed.

3. The Commission received protests from Timothy W. Balazic, dba Northwest Disposal Service (PSC No. 2714), and Marc W. Johnson (PSC No. 1448, leased to Flathead Disposal, Inc.), and Evergreen Disposal, Inc. (PSC No. 2710).

4. The Commission noticed the application for hearing on January 16, 1996, scheduling the hearing for February 13, 1996 in Kalispell. On February 2, the Commission filed an Amended Notice of Public Hearing, moving the hearing to the evening of February 12, 1996 in Lakeside instead of Kalispell. On February 5, 1996, Protestants filed a Motion for Continuance, requesting time to file interrogatories. The Hearing Examiner denied this Motion and directed the Applicant to provide Protestants basic information, including its witness list and other reasonable information to assist with preparation for hearing.

5. Beginning at 6:00 p.m. on February 12, 1996, the Commission conducted a public hearing on the application at the Somers South School Gym, Lakeside, Montana before Hearing Examiner Bob Rowe, Commissioner for District 5. At the conclusion of the hearing, parties agreed to file simultaneous briefs and reply briefs on March 4 and March 14, 1996.

SUMMARY OF TESTIMONY

Applicant's witnesses

6. The Applicant, William H. Hoyer, moved to Lakeside, Montana in June of 1995. Mr. Hoyer's previous employment included 16 years of dealing with the public as a construction foreman. Mr. Hoyer has no personal experience in the garbage business. However, his wife's family operates a garbage service in Michigan and they have had many discussions on garbage business. He is not familiar with existing garbage service on the west shore of Flathead Lake, but believes there is a need for someone to do recyclables. He wants to pick up brush and items that do not go to the green boxes. He would need monthly contracts and do a full time business, to make a living. He proposes

a monthly garbage hauling service, separating recyclables, plus garbage hauling, plus one time service for residential customers only. He does not propose commercial service.

7. The Applicant intends to offer year-round garbage service six or seven days per week. The Applicant expects to advertise in the West Shore News, the telephone book, fliers and by personal solicitation. Mr. Hoyer estimates that he will have 200 residential customers within the first two or three months of operation, with 300-400 by the end of the first year. Blacktail intends to charge \$10 per month for once-a-week residential service, with no extra charge for recyclables if the customer uses Blacktail Disposal for residential garbage services. Otherwise, there would be a separate charge for picking up recyclables. He has made no quotes yet, but he expects that recyclable service only would cost about \$6 - 7 per month. Extra charges would be imposed for picking up large items such as appliances.

8. Mr. Hoyer owns no real property and his only assets are those listed in his PSC application. He proposes residential service, no commercial, believing that would limit the necessary investment. To meet the sanitary requirements that the garbage should be covered, he has a camper shell for his 1977 Ford Pickup, two-wheel drive. His 7 foot by 12 foot trailer can be tarped. He is purchasing a 1981 Nissan, four cylinder pickup, with over 100,000 miles. He may lease additional equipment from Davey Disposal in Missoula, owned by his wife's cousin. Additional back-up equipment will be available through his wife's family garbage business in Michigan. Mr. Hoyer testified that it takes three days to drive a garbage truck from Michigan to Montana.

9. Mr. Hoyer will be the only employee of Blacktail Disposal and will also do the billing and office work, with the help of his family. He will personally maintain the vehicles. If repairs are beyond his expertise, he will use Lakeside Automotive in Lakeside, Montana. Mr. Hoyer testified that he will not take a vacation until the business can afford to hire employees. He will pick up garbage, even if he is sick. If he were injured, he would have to hire an employee. He estimates his expenses to be about \$70 per day for gas and oil. He has no estimate for licensing. However, he expects expenses to consume \$2.00 of every \$2.50, including legal expenses, insurance and advertising.

10. The Applicant entered into a stipulation with one of the Protestants in this proceeding, Evergreen Disposal, Inc. of Kalispell, in which Blacktail agreed not to provide any garbage service north of Montana Highway 82 (Evergreen Exhibit A). Mr. Hoyer testified that as a condition of any Class D permit he would agree not to knowingly provide residential garbage service to any residence currently served by an existing Class D carrier for one year after beginning service (Northwest Disposal Exhibit D).

11. On June 14, 1995, William Hoye filed an Application for Registration of Assumed Business Name with the Montana Secretary of State (Northwest Disposal Exhibit C), stating that Mr. Hoye would start his business on July 6, 1995. The application was filed approximately one month after Mr. Hoye moved to Montana. In August or September, 1995, Blacktail Disposal began distributing leaflets advertising garbage service and indicating that Blacktail would haul recyclables (Northwest Disposal Exhibit A). The flier advertises a phone number and urges recipients to call "for rates and free quotes."

12. Blacktail Disposal introduced yellow page advertisements for garbage collection services in the Flathead Valley (Applicant Exhibit A). Northwest Disposal, Flathead Disposal and Evergreen Disposal have advertisements and telephone numbers published in Applicant Exhibit A.

13. Diane Thompson testified as a public witness in support of Blacktail Disposal's application. Ms. Thompson resides in Lakeside, Montana and testified that she would use Blacktail's services for her residence and her business. Ms. Thompson did not know that Blacktail Disposal does not intend to provide garbage service to businesses. Ms. Thompson indicated that she was not aware that other existing providers were authorized to serve the area. Ms. Thompson presently takes her garbage to the green boxes and believes in recycling. She likes the fact that the Applicant would separate recyclables. Presently she uses a compactor and takes the garbage to the green boxes once a week or every other week, and takes her recycling to Kalispell. Ms. Thompson has lived in the area since 1980; she expressed astonishment that existing carriers had not contacted her or that she had not seen their trucks driving by her business.

14. The only other public witness to support Blacktail's application was Sue Symons. Ms. Symons resides in Lakeside, Montana and acquired her residence in 1994. She believes in recycling and wants someone to provide recycling services. She asked her neighbors what to do about garbage hauling and was told "green boxes" only, no haulers. They bought a truck, in part to haul garbage. Ms. Symons testified that she called a disposal company in Bigfork (she assumes Northwest Disposal) late last summer requesting information on the cost of picking up a refrigerator and stove. She testified that the carrier she called told her that they did not do recycling and would only provide every other week service; they did not seem to want to handle several items. She has seen big garbage trucks, but thought they were the county's. She saw Applicant's advertisement and appreciated the fact that Applicant wanted to do the local business. She would not have called an existing carrier, because it was not a Lakeside number. She admitted that Bigfork and Polson are local telephone numbers in Lakeside. Ms. Symons believes in local service and wants a garbage service based in Lakeside.

Protestants' witnesses

15. Tim Balazic is the owner/operator of Northwest Disposal. Mr. Balazic purchased Northwest Disposal in 1986. Northwest Disposal has PSC authority to serve all of the Applicant's proposed service area as well as the east side of Flathead Lake. Northwest Disposal serves 350-400 residential accounts year-round and an additional 150-200 residences during the summer months. Northwest has 30 residential customers in Lakeside, plus another 30 in the summer; 15-20 customers in Somers; 10 in Rollins. Northwest offers once a week service. Its residential rates average \$8-12 per month. Northwest Disposal has 8 trucks, 2 full-time employees and 1 part-time employee. Two of Northwest Disposal's trucks provide service to Lakeside each week.

16. Mr. Balazic testified that at least four private carriers, Evergreen Disposal, Northwest Disposal, Flathead Disposal and Mission Valley, have Class D authority to provide garbage service in all or a portion of the Applicant's proposed service area. In addition, both Lake and Flathead Counties provide containerized garbage collection sites throughout the proposed service area. Real property owners in Flathead County are assessed an annual \$65 charge to pay for the "green box" collection system. The green boxes are not monitored and anyone can dispose of garbage without charge in Flathead County's green boxes. The availability of the green boxes makes it difficult, if not impossible, for private carriers to attract new residential customers. Mr. Balazic sent a mailing to each residence in his service area as recently as four years ago, including Somers, Lakeside and Rollins. Only one new customer in the Lakeside-Somers area signed up for residential service as a result of the mailing.

17. Mr. Balazic testified that a four-wheel drive vehicle is essential to collect residential garbage in the winter months. Many of the residences served by Northwest Disposal are located hundreds of feet off main roads in steep terrain. In the winter, a four-wheel drive truck is necessary in order to provide garbage service.

18. When Mr. Balazic acquired Northwest Disposal ten years ago, the business was experiencing severe financial and service problems. Mr. Balazic had to make substantial capital investments to replace and repair equipment. Mr. Balazic testified that he recently purchased a used one-ton garbage truck for \$20,000. The same truck new would cost \$45,000-\$50,000. A Class D carrier must have a line of credit to make such purchases. Northwest Disposal does not make a profit every year. Flathead County's green box system prevents any significant expansion of residential garbage services in Flathead County. Authorizing another carrier to provide residential services would have a detrimental impact on Northwest Disposal.

19. Northwest Disposal is able and willing to provide garbage services to the public witnesses who testified in support of the Applicant. Mr. Balazic testified that he did not talk to Sue Symons regarding her request to haul away a refrigerator and stove. Mr. Balazic is not aware of any

complaints filed with the PSC, with Flathead County or with Lake County concerning garbage collection services provided by Northwest Disposal during the ten years he has operated the business.

20. Mr. Balazic testified that there is no mandated recycling program in either Flathead or Lake Counties. All garbage thrown in the green boxes is dumped in the respective landfills. In the absence of a mandated recycling program, it is not economically feasible to provide recycling services.

21. Marc Johnson, owner/operator of Flathead Disposal, has been in the garbage collection business for 17 years. He also owns the PSC permit which has been leased to Mission Valley, of which he is part owner. Flathead Disposal and Mission Valley have Class D permit authority to provide garbage service in a portion of the Applicant's proposed service area. Flathead Disposal has served commercial customers in Lakeside. Dayton, south of Rollins, is as far north as Flathead Disposal provides residential service. He has not attracted more business because of the four county sites which are "free" and easily accessible. The competition is tight from Balazic and McDonald. Both have four-wheel drive, while Mr. Johnson does not. Mr. Johnson is surprised that anyone could sustain a business in the area. Mr. Balazic's example of driving up a difficult road for one customer is one illustration: The other 12 residents up that road probably use the green boxes. If the green boxes were removed, the existing Class D carriers could provide garbage service to all of the residential and commercial businesses located in the Applicant's proposed service area.

22. Mr. Johnson emphasized the need for backup equipment and personnel to provide quality garbage service, available each day to deal with equipment malfunctions and worker illness. One person cannot operate a garbage service alone, he testified. His businesses have six trucks, five on line. One is rear-load for brush; three are automated to pick up barrels and provide roll-off service for large industrial customers. New trucks run \$120,000. They now buy used for \$30,000 - 40,000, and rehabilitate for a total of \$50,000 per truck. Mr. Johnson testified that one needs a line of credit to maintain and to keep up with growth.

23. Mr. Johnson is not aware of any complaints filed with the PSC, with Flathead County or with Lake County concerning garbage collection services provided by Flathead Disposal or Mission Valley during the 17 years he has operated the business. Mr. Johnson testified that there are six public and private entities providing garbage service in the Applicant's proposed service area. Licensing another carrier would adversely impact his garbage businesses.

24. Larry Jochim testified as a public witness opposed to the Blacktail Disposal application. Mr. Jochim, President of Flathead Bank of Bigfork, formerly was Northwest Disposal's banker, but has no current financial interest. Mr. Jochim testified that when Mr. Balazic acquired Northwest Disposal in 1986, the previous owner was experiencing significant financial and service

problems. Mr. Balazic made the necessary capital investments to create a viable business. Winter is a problem with lakeside homes, he testified. A carrier has to continually inject money and is only viable through growth in the area. While there was substantial growth in 1992, there is a lull now. There could be a need for a future carrier in the west. Now, however, licensing an additional carrier would adversely affect Northwest Disposal and the quality of garbage service in the area. Northwest Disposal provides garbage service to Mr. Jochim's residence and the Bank. Mr. Jochim is completely satisfied with the quality of service provided by Northwest Disposal and he has never had any complaints about Northwest's service.

25. Larry Gerkin, Bigfork, testified as a public witness opposed to Blacktail's application. He has known Tim Balazic since 1986. As a customer of Northwest Disposal, Mr. Gerkin testified that Northwest Disposal has always provided excellent service.

26. Dale Lauman testified as a public witness opposed to licensing Blacktail Disposal. Mr. Lauman has lived in the Lakeside area for 11 years and served 7 years as a member of the Flathead County Solid Waste Board. Mr. Lauman also served as Chair of the Board. Mr. Lauman testified that the quality of service provided by Northwest Disposal and Flathead Disposal was exemplary and that he is not aware of any complaints about service from these private entities. Mr. Lauman explained the green box system operated by Flathead County and indicated that the presence of the green box system made it difficult for private carriers to attract residential customers. Mr. Lauman testified that there is already a competitive market for garbage disposal services in the area and there is no need for an additional Class D carrier. Licensing an additional carrier would harm existing carriers and cause a degradation in quality of service. Mr. Lauman acknowledged that while there has been growth in the area, licensing another carrier would adversely affect private carriers because of the presence of the green box system.

27. Karen Nagelhus, a Bigfork resident with a business on the west side between Somers and Lakeside, has been a commercial customer of Northwest Disposal for 8 years. Ms. Nagelhus indicated that the quality of Northwest's service has been excellent. Ms. Nagelhus also praised Northwest Disposal for donating garbage collection services to community events.

28. Gerald Carlson, Somers, testified as a public witness in opposition to the Blacktail Disposal application. Mr. Carlson believes there will be an adverse impact on the quality of garbage service in the area if another carrier is licensed. Northwest Disposal's equipment is sanitary and clean and Mr. Carlson has always been extremely satisfied with Northwest Disposal's service.

29. Don Thomson testified as a public witness opposed to the application of Blacktail Disposal. Mr. Thomson owns and operates the Bigfork Summer Playhouse. Mr. Thomson praised Northwest Disposal for donating garbage services to community events. The Bigfork Summer

Playhouse has been a customer of Northwest Disposal since Mr. Balazic took over the business in 1986. The Bigfork Summer Playhouse has a 30 bed dormitory and a scene shop generating garbage, along with the 450 people a night in the theater. Northwest Disposal has been flexible and met the special needs of the business. Northwest Disposal has provided excellent garbage collection services to the dormitory and theater.

FURTHER FINDINGS AND DISCUSSION

30. Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA), the Commission supervises and regulates intrastate motor carrier service. ' 69-12-201, MCA. The maintenance of an adequate common carrier motor transportation system has been declared a public purpose. ' 69-12-202, MCA. To obtain motor carrier operating authority, a motor carrier must file an application with the Commission, which will give notice of the filing and schedule a hearing upon filing of a protest or a request for a hearing. ' 69-12-321, MCA.

31. Section 69-12-323, MCA, sets out the requirements for a Commission decision on an application for a certificate and the evidence presented at hearing. The Commission shall find and determine from the evidence whether public convenience and necessity require authorizing the proposed service. The Commission will consider existing transportation service; the likelihood of the proposed service being permanent and continuous 12 months of the year; and the effect of the proposed service on other essential transportation service in the affected communities. Under ' 69-12-323(2)(b), MCA, for purposes of Class D certificates, a determination of public convenience and necessity may also include a consideration of competition.

32. The Commission has interpreted ' 69-12-323, MCA, as requiring it to address these issues before granting an application for authority:

- a. Is the applicant fit and able to perform the proposed service?
- b. Does the public convenience and necessity require the authorization of the proposed service?
- c. Can and will existing carriers meet the public need for the proposed service?
- d. Would the proposed service have an adverse impact on existing transportation service?
- e. **(Discretionary for Class D applications, only)** If there is a public need for the service and applicant is fit to provide the service, but existing carriers could meet the need or might be harmed by granting the application, would competition with the existing carriers promote the public interest?

Fitness

33. The Commission makes a threshold determination of whether the applicant is fit, willing and able to provide the service, considering these factors: (1) the financial condition of the applicant; (2) the intention of the applicant to perform the service sought; (3) the adequacy of the equipment the applicant has to perform the service; (4) the experience of the applicant in conducting the service sought; and (5) the nature of previous operations, if there are allegations of illegal operations.

34. The Commission finds that Applicant's fitness to provide the service for which he has applied is questionable as presented in testimony and in the application. Financial records do not indicate that Applicant has the ability to acquire and maintain suitable equipment. The equipment he proposes using (two elderly pickup trucks) does not meet the minimum requirements for a garbage operation, i.e., at least one garbage truck. Applicant's proposal to cover the garbage with a pickup shell or a tarp does not convert the vehicles into garbage-hauling equipment. The Commission understands that one could provide adequate garbage service with a well-maintained used garbage truck. However, Applicant has not demonstrated the actual financial capacity to acquire such a vehicle. Applicant has placed a 1981 Nissan pickup on a payment plan and owns a half-ton 1977 Ford pickup worth \$1,200, according to the application. Unrefuted testimony of experienced garbage haulers indicates that a used garbage truck would cost between \$20,000 to \$50,000. Applicant's financial records indicate no line of credit or assets to back a garbage operation.

35. Applicant may intend to do the super-human and provide garbage service with these pickup trucks on a 12-month a year basis all by himself. His admitted lack of experience in garbage-hauling, however, makes his plan seem all the more implausible. There is no evidence that Applicant has more than the good intention to provide the service. It is questionable that Applicant has met the threshold burden of establishing fitness. If there were a genuine additional need for garbage hauling service, however, the Commission might give Applicant the benefit of the doubt if it would promote the public interest. Therefore, the Commission will proceed with the traditional analysis.

Public Need and Convenience

36. In determining public convenience and necessity, the Commission has traditionally followed the analysis of Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936).

The question in substance is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing

the operations of existing carriers contrary to the public interest. 1
M.C.C. 203.

Competition and Public Convenience and Necessity

37. The public need to meet in an application for a certificate of public convenience and necessity is shipper need. In a Class D application, this need is for garbage hauling service. It is a given that there is a public need to have garbage hauled. However, the testimony did not establish an additional need for garbage hauling service that was not being met by existing carriers or by the "green boxes" provided by the counties and paid for by taxes. The two public witnesses supporting the application wanted recycling and garbage service provided by someone from Lakeside. Preference for a local hauler does not rise to the level of public convenience and necessity, particularly when there is an abundance of garbage service, including the county green boxes, right in the locale. Both Protestants are a local call away. They have established authorities, routes and adequate equipment to serve the needs of the area Applicant proposes. As to the towns of Rollins and Somers, and five mile radii, no one appeared to testify in support of the need for Applicant's services. The many public witnesses opposing the application averred to the good service of the existing carriers. The Commission finds that Applicant failed to raise a need that was not being met or could not easily be met by the existing carriers, who expressed willingness to do so. The Applicant failed to offer any evidence that there is any unmet need in his proposed service area. The testimony certainly did not raise the issue of any need for competition to improve service or rates.

38. The Commission finds that if the application were granted, Protestants would be harmed. Protestants provided substantial testimony as to their investments in the businesses and the harm from further inroads into their service areas. Four licensed Class D carriers already provide garbage services in the Somers, Lakeside and Rollins areas. In addition, Flathead and Lake Counties provide containerized garbage collection services. The private carriers not only compete with one another, but they also compete with the county container systems. The containerized collection systems are paid for by a yearly assessment (\$65 in the case of Flathead County) on all real property in the county. Anyone can then dispose of garbage in the containers regardless of residency. The availability of the green boxes limits the number of residential customers willing to pay an additional fee for garbage collection services.

39. Because of an act of Congress and subsequent partial motor carriage state deregulation in the 1995 legislature, the Commission no longer has authority over Class C recyclable hauling. Applicant's two public witnesses expressed a desire for recycling services. The Applicant can collect recyclables and charge for the service without obtaining a Class D permit. However, without Class D garbage hauling authority, he could only haul recyclables. He could not have

garbage intermingled to sort out later. If he were to pick up any garbage, he would be subject to the PSC's enforcement authority and possible citations.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. " 2-4-601, et seq., MCA.

3. An applicant for a certificate of Class D operating authority must show that the public convenience and necessity require the proposed service. A determination may include a consideration of competition. ' 69-12-323, MCA.

4. Applicant has not demonstrated a public demand or need for the proposed service which is not met or cannot be met as well by existing carriers.

5. Granting this application would have an adverse effect on Protestants.

6. Applicant has not shown that competition requires a grant of this authority in promotion of the public interest.

7. Applicant did not demonstrate the experience or financial wherewithal to provide garbage hauling service; the Commission concludes that this threshold requirement of fitness could be overlooked only when the public desperately needs service, and no one else could provide it. Only then could the Commission give the Applicant the benefit of the doubt.

ORDER

NOW THEREFORE IT IS ORDERED that the application of William H. Hoye, dba Blacktail Disposal, Lakeside, Montana for a Class D Certificate of Public Convenience and Necessity is denied.

Done and Dated this 29th day of April, 1996 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.